ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION III

CA06-965

KEVIN JONES

MAY 2, 2007

APPELLANT

v.

APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT
[DR-1998-154-2]

OFFICE OF CHILD SUPPORT ENFORCEMENT

HONORABLE PHILLIP H. SHIRRON, JUDGE

APPELLEE

AFFIRMED

This appeal arises from the trial court's order denying appellant Kevin Jones's motion to set aside a default judgment entered against him, which found that he was the biological father of the minor child, and granting his motion to terminate child support. He has two arguments on appeal. First, appellant argues that the trial court erred in denying his motion to set aside a default judgment. Second, appellant argues that the trial court erred in ruling that the equitable defenses did not apply to collecting the arrearage judgment. We affirm.

On June 24, 1998, a hearing was held regarding paternity and child support of the minor child in this case. Appellant was served on June 17, 1998, with a summons; however, he was not present at the hearing. During the hearing, it became apparent that appellant was incarcerated. It also became apparent that the time allowed for him to file an answer had not passed. As a result, the court reset the hearing date for July 22, 1998. Later that afternoon, the matter came before the court again, and the attorney informed the court that appellant was, in fact, incarcerated. The judge instructed the attorney to bring appellant to the hearing. When appellant arrived, he told the court

that he was incarcerated on "old fines." Appellant also informed the court that he intended to hire an attorney and contest the issue of paternity and child support. Because he still had a few days remaining to file an answer, the hearing was continued until July 22, 1998.

Appellant did not appear at the hearing on July 22, 1998. The court proceeded with testimony from Mary Mitchell, the baby's mother. Mitchell testified that appellant was the father of her then 18-month-old child. She testified that a paternity test excluded Roger Cooper, the only other person that could have possibly fathered the child, as the child's biological father. The court set child support at forty-seven dollars a week, plus costs and fees. The trial court left the issue of visitation open in the event appellant requested visitation with the child in the future.

On January 18, 2006, a hearing was held on a motion for contempt filed by the Office of Child Support Enforcement. Appellant was present at the hearing, but did not have an attorney. Appellant requested a paternity test, and his request was granted. Following the hearing, an order was entered on February 14, 2006, finding that an arrearage in the amount of $14,342.54 had accrued as of January 14, 2006. The order set forth a judgment of $14,342.54 to the Office of Child Support Enforcement. The order also set forth that appellant was in contempt of court and was sentenced to ten days in jail time, to be suspended if he complied with the order of the court. Appellant's child-support obligation was continued at $47 per week, and appellant was ordered to pay an additional $10 per week to satisfy the judgment. After the January 18, 2006 hearing and prior to the entry of the February 14, 2006 order, a genetic test report was filed with the court, excluding appellant as the biological father of the minor child.

On May 3, 2006, appellant filed a motion to set aside the 1998 default judgment against him, which found that he was the biological father of the minor child, and a motion to terminate child support. A hearing on these motions was held on May 10, 2006. Appellant was present at the

hearing. Appellant's attorney, Mr. Crain, argued that the default judgment should be set aside because appellant was not served with notice of the July 22, 1998 hearing where he was found to be the father of the minor child and ordered to pay child support. Appellant testified that it was not until 2000, when the mother informed him that he was the father of the minor child, that he first learned anything about the situation. He stated that he became aware of the issue when he was working at Wal-Mart and realized that his employer was deducting money from his paycheck. Even though appellant worked at Wal-Mart for two and a half years, he testified that he never questioned the reason for the deduction from his paycheck. Appellant further testified that the first time he appeared in court in this case was a "couple of months ago" when he was taken to the Sheridan jail on a pick-up order. On January 18, 2006, he appeared in court and requested a paternity test. When questioned by the court as to whether he was incarcerated in or around April 1998, appellant testified that he could not remember.

Kay Smith of the Office of Child Support Enforcement testified that appellant was given notice of the July 22, 1998 hearing, but did not appear. She testified that her office records indicated that she specifically noted that appellant was told to be in court on July 22, 1998. The entry in the records states, "NCP was served in jail in Hot Spring County. Judge told NCP to be back in court on the 22nd of July, sent the notice to the CP to be in court." Therefore, she concluded that appellant was notified of the hearing, but did not appear in court on that day.

At the conclusion of the hearing, the trial court found that appellant was served at the Hot Spring County jail with notice of the July 22, 1998 hearing. The trial court denied appellant's motion to set aside the default judgment and awarded judgment of $14,342. 54 in favor of the Office of Child Support Enforcement for the child-support arrearage. Appellant's motion to terminate child

support as to future payments was granted.[1] From this order, appellant brings this appeal.

Appellant's first argument on appeal is that the trial court erred in denying his motion to set aside the default judgment. Arkansas Rule of Civil Procedure 55(c) (2006) states that,

> The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

A trial judge has wide discretion in determining whether a default judgment should be set aside, and this court will not reverse the decision of the trial judge absent an abuse of that discretion. *Hendrix v. Hendrix*, 26 Ark. App. 283, 764 S.W.2d 472 (1989) (citing *So. Paper Box Co. v. Houston*, 15 Ark. App. 176, 690 S.W.2d 745 (1985)). While it is true that defendants wishing to set aside default judgments must demonstrate a meritorious defense to the action, the defense in and of itself is not sufficient without first establishing one of the grounds laid out in Ark. R. Civ. P. 55(c). *McGraw v. Jones*, 367 Ark. 138, ___ S.W.3d ___ (2006) (citing *So. Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998); *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996)). Appellant argues that the initial judgment was based on fraud or misrepresentation. Specifically, he asserts that, because the paternity test excluded him as the biological father, the child's mother misrepresented the fact that appellant was the father of the child when she signed the verified petition that named appellant as the father.

To establish fraud a plaintiff must show: (1) a false representation of material fact; (2)

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[1]The trial judge's order was consistent with the statute providing for termination of future child support, Ark. Code Ann. § 9-10-115(f)(1), which was in effect at the time of the 1998 hearing. We recognize, however, that since the hearing in this case, our general assembly has amended section (f)(1) of the statute. *See* Act 60 of 2007.

knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance upon the representation; (5) damage suffered as a result of the reliance. *McAdams v. Ellington*, 333 Ark. 362, 970 S.W.2d 203 (1998) (citing *Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997)). At trial, most of the testimony revolved around appellant's argument—an argument that was only made below and not on appeal—that he was not served with notice of previous hearings. Other than the results of the paternity test excluding appellant as the father, appellant presented no evidence that Mary Mitchell made a false representation of material fact. Furthermore, appellant offered no evidence addressing the other factors, including that the mother had knowledge that the representation was false, that she had the requisite intent to induce action or inaction in reliance upon the representation, or that there was any justifiable reliance upon the representation. Without providing some evidence of the elements of fraud, other than that the statement was false, appellant did not meet his burden.

For his second argument, appellant asserts that the trial court erred in ruling that the equitable defense of "unclean hands" does not apply to collecting the arrearage judgment. Specifically, appellant asserts that the unclean-hands doctrine should apply under these facts where the mother of the minor child committed fraud or misrepresentation when she signed the verification that appellant was the biological father. Again, appellant relies solely on the results of the paternity test as his proof that Mitchell committed fraud and thus, the unclean-hands doctrine applies in this case. The trial court stated in its oral ruling that:

> You know, unclean hands might have applied if you could have proven that she knew, had strong reason to believe that there was another. But I'm not sure just because she signed this as a verification that she didn't think that at the time.

Appellant offered no proof to the court to demonstrate the requisite scienter of Mary Mitchell to commit fraud or misrepresentation. *See Cincinnati Life Ins. Co. v. Mickles*, 85 Ark. App. 188, 148 S.W.3d 768 (2004) (stating that deceit or fraud requires scienter, an intent to misrepresent). Based on the foregoing, we affirm.

HART and GRIFFEN, JJ., agree.